No. 89-1821

In The

# Supreme Court of the United States

October Term, 1990

CHARLES Z. STEVENS, III,

*Petitioner,*

vs.

UNITED STATES DEPARTMENT OF THE TREASURY, NICHOLAS F. BRADY, SECRETARY, U.S. DEPARTMENT OF THE TREASURY,

*Respondents.*

On Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

## REPLY BRIEF FOR PETITIONER

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES





## TABLE OF AUTHORITIES – Continued

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## REPLY BRIEF FOR PETITIONER

### STATEMENT OF THE CASE

Respondent has conceded that the court of appeals erred when it denied Petitioner Stevens a federal judicial forum to pursue a claim under the Age Discrimination in Employment Act (ADEA). As respondent correctly notes, § 15 of the ADEA, 29 U.S.C. § 633a, does not require victims of discrimination to exhaust administrative remedies before seeking judicial relief. Respondent agrees with petitioner that nothing in the text or legislative history supports imposing an exhaustion requirement upon plaintiffs seeking to vindicate ADEA claims against

the federal government. Respondent also notes that the Equal Employment Opportunity Commission, which administers ADEA, has concluded that the Act does not impose an exhaustion requirement, *see* Brief for respondent at 27-28, and correctly states that since that interpretation is fully consistent with ADEA's purpose of providing federal employees with a judicial forum for their age discrimination complaints, it is therefore binding on this Court. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

Respondent nevertheless urges this Court to dismiss the writ of certiorari as improvidently granted. This argument must be rejected. As will be demonstrated, dismissal would be entirely inappropriate for two reasons. First, dismissal would be fundamentally inconsistent with this Court's duty to ensure the correct and uniform application of federal law because a clear conflict in the circuits, on a recurring issue of substantial importance, would be left unresolved.[1] Second, there exists no bar – prudential or otherwise – to this Court's consideration of the substantive issues presented in the petition because those issues were *decided* by the court of appeals.

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[1] Petitioner raises two issues on certiorari. First, he asserts that reading § 15(d)'s mandate that federal employees may file their ADEA civil actions "not less than" thirty days after giving notice of intent to do so to mean that such suits are untimely if they are not filed "within" thirty days is a clear misreading of the statutory language. Though there is not, technically, a split in the circuits on this issue, at least two courts of appeals other than the one in the instant case have made this same misreading, *Castro v. United States*, 775 F.2d

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## ARGUMENT

### I. This Court Should Review The Questions Presented Because They Raise An Important And Recurring Issue Of Federal Law On Which The Courts Of Appeals Are Divided.

Dismissal of the writ in this case would be inappropriate for several reasons:

*First*, this Court has already evaluated, and implicitly rejected, respondent's arguments against review in this case. "The 'decision to grant certiorari represents a commitment of scarce resources with a view to deciding the merits . . . of the questions presented in the petition.' " *St. Louis v. Praprotnik*, 485 U.S. 112, 120 (1988); *quoting Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *see also City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1202 (1989). In the present case, the decision has been made and the

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399, 403 (1st Cir. 1985), *McKinney v. Dole*, 765 F.2d 1129, 1140 (D.C. Cir. 1985) and remedial action by this Court is thus warranted to prevent further error. Petitioner's second question pertains to whether § 15(b) administrative remedies must be timely exhausted by federal ADEA claimants as a precondition to suit. It is this issue that divides the circuits from each other, compare *Langford v. United States Army Corps of Eng'rs*, 839 F.2d 1192 (6th Cir. 1988), *Kennedy v. Whitehurst*, 690 F.2d 951 (D.C. Cir. 1982) and *Ray v. Nimmo*, 704 F.2d 1480 (11th Cir. 1983) (supporting the no exhaustion position urged by both parties before this Court) with *Purtill v. Harris*, 658 F.2d 134 (3rd Cir. 1981), *cert. den.*, 462 U.S. 1131 (1983), *McGinty v. United States Dept. of the Army*, 900 F.2d 1114 (7th Cir. 1990), *Castro v. United States*, 775 F.2d 399 and *White v. Frank*, 895 F.2d 243 (5th Cir. 1990), *cert. den.*, 111 S.Ct. 232 (1990), as well as internally, compare *Wrenn v. Secretary*, 918 F.2d 1073 (2nd Cir. 1990) with *Bornholdt v. Brady*, 869 F.2d 57 (2nd Cir. 1989).

resources of the Court and the parties have been committed.

*Second*, there is no dispute that this case presents a recurring issue of national importance on which the courts of appeals are divided. *See* Resp. Br. at 17 (conceding existence of conflict in the circuits). The issue potentially affects *every* person with an age discrimination complaint against the federal government. Plaintiffs in different circuits are presently subject to different rules respecting exhaustion of administrative remedies. In urging that the petition should nonetheless be dismissed, respondent in effect asks this Court to ignore its primary responsibility to ensure the correct and uniform application of federal law, *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

*Third*, the ruling below was – as all concede – clearly wrong and petitioner was thus deprived of his right to bring an age discrimination suit in federal court. It would be manifestly unjust to leave this error uncorrected, and deny petitioner the federal judicial forum Congress intended.

For these reasons, the case should proceed. This Court should enter a judgment in favor of petitioner on the merits, thereby correcting the error below and clarifying the proper rule respecting exhaustion of remedies by federal employees under the Age Discrimination in Employment Act.



## II. Because The Court Of Appeals Decided The Questions Of Law Presented In The Petition, Prudential Considerations Do Not Bar Review.

Respondent urges dismissal because "this case does not present exceptional circumstances justifying a departure" from this Court's practice of refusing to consider issues not preserved below. *See* Resp. Br. at 11. That assertion rests on a faulty premise. As a prudential matter, this Court generally declines review when the question presented in a petition for certiorari "was not raised or considered in the Court of Appeals." *Department of Treasury v. F.L.R.A.*, 110 S.Ct. 1623, 1630 (1990). The issues presented in the petition for certiorari in this case, however, *were* decided by the court of appeals. Accordingly, review is entirely proper without any showing of "exceptional circumstances."

Respondent does not claim that the court of appeals failed to decide the issues in the petition. To the contrary, respondent repeatedly concedes – as it must – that the issues were decided. *See, e.g.*, Resp. Br. at 12. That concession disposes of respondent's argument. This Court has consistently made clear that "there can be no question as to the proper presentation of a federal claim" when the lower court has passed on the merits of that claim. *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959); *see also Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971); *Franks v. Delaware*,

438 U.S. 154, 161-62 (1978).[2] Once the court below has reached the merits of a federal question, whether that question was fully raised and briefed becomes irrelevant.[3] The sorts of prudential considerations raised by respondent simply do not come to bear.

Even if this Court were to evaluate whether prudential considerations suggest dismissal – and it should not – respondent has not made the case for dismissal. Respondent does not contest that: petitioner raised both the § 15(d) timing and § 15(b) exhaustion issues in the district court;[4] the district court decided the issue adversely to

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[2] This principle applies even in the context of review of state court decisions, where principles of comity and federalism weigh strongly against review unless an issue has been properly preserved in the state court.

[3] Respondent suggests that the Fifth Circuit's internal rules are at variance with this. They are not. Waiver of an issue for failure to brief it is a prudential rule in the Fifth Circuit, not a jurisdictional one, and does not prevent that court's reaching unargued issues if it chooses, *see United Paperworkers Int'l Union v. Champion Int'l*, 908 F.2d 1252, 1255 (5th Cir. 1990). Indeed, one of the purposes of this rule is to protect parties from decisions based on issues they have not had an opportunity to argue *In Re Matter of Texas Mortgage Services Corp.*, 761 F.2d 1068, 1074 (5th Cir. 1985), something not at issue here, since the respondent fully argued these issues. Resp. CA Br. 6-7.

[4] [Record references are to the separately bound and paginated transcript [Rtr.] or pleadings [Rpl.] volumes and to the Joint Appendix [J.A.]. Exhibits are referred to by their district court exhibit number [G.Ex.] or [P.Ex.]].

Petitioner's § 15(d) notice of intent to sue was attached as an exhibit to his complaint [J.A. 15] and offered into evidence

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petitioner on the basis of a clear error of law;[5] the question presented to the court of appeals specifically raised

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by stipulation [Rtr. 12, G.Ex. 4, p.65]. Petitioner also testified concerning his attempts to follow the § 15(d) process set forth in his personnel manual [Rtr. 18-19; 22]. In response to respondent's Rule 41(b) dismissal motion, petitioner specifically cited the distinction between the ADEA and other employment discrimination statutes on the exhaustion issue and urged denial of the motion on the basis of his timely filing of a § 15(d) notice of intent to sue within 180 days of the allegedly discriminatory act [Rtr. 80, Lines 8-18; J.A. 22; Resp. Br. 1a]. Petitioner also argued, alternatively, that even if exhaustion were required, he had done so by allowing his untimely administrative efforts to run their course before he filed suit. [Rtr. 80, Lines 18-21; Resp. Br. 1a].

[5] In its Order and Memorandum Opinion, the District Court dismissed petitioner's case on the basis of what it referred to as the "jurisdictional issue." Pet. App. A-1. Adopting nearly verbatim respondent's proposed conclusions of law [Rpl. 14-15] the court expressly rejected petitioner's contention that he preserved his right to proceed pursuant to the § 15(d) bypass route, holding instead that § 15(d) permitted only suits initiated "no later than 180 days from the unlawful action" where the claimant has notified the EEOC "within 30 days prior to commencing suit." Pet. App. A1-3. The court further held that under § 15(b), an unsatisfied employee may bring suit "only after exhausting his administrative remedies." *Id.* Because petitioner had defaulted on time requirements in both the §§ 15(b) and 15(d) processes, the court concluded, he could not proceed with his claim in federal court. Pet. App. A-4. As both parties before this Court now agree, the district court's ruling rested on a plainly erroneous reading of the relevant law as it pertains both to the deadline for suit filing under § 15(d) and to exhaustion of remedies under § 15(b).

the issues presently before this Court;[6] respondent specifically addressed the merits of these questions in its brief to the court of appeals;[7] and the court of appeals decided both issues on the merits.[8] At bottom, therefore, respondent urges this Court to leave standing a clearly

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[6] The question presented to the Court of Appeals read as follows:

> "If an aggrieved party fails to file an administrative age discrimination complaint in the time frame of the general administrative provision of the Equal Employment Opportunity Commission, does such failure deprive a Federal District Court of jurisdiction to hear a civil action filed under the Age Discrimination in Employment Act where a charge has been timely filed thereunder."

Pet. C.A. Br. 1-2.

[7] Respondent specifically argued in the court of appeals, as it had in the district court, that under § 15(b) petitioner was required to "properly exhaust his administrative remedies like employees alleging other types of discrimination" and that § 15(d) required filing suit "within" thirty days of the notice of intent to do so, Resp. C.A. Br. at 6-7. This argument is reprinted in its entirety as an appendix to this brief.

[8] The court of appeals' misreading of § 15(d) to mean that suits must be filed "within" thirty days of notice of intent to do so is the basis on which it affirmed the district court's dismissal of the action despite its conclusion that petitioner had timely filed his § 15(d) notice of intent to sue, Pet. App. A-7. The court of appeals also expressly ruled that petitioner's § 15(b) administrative remedies were untimely and could therefore not serve as the predicate for suit, Pet. App. A-6, thereby affirming the district court's exhaustion ruling as well.



erroneous ruling of federal law, and leave unresolved a split in the circuits on an important and recurring issue, for the sole reason that the petitioner did not address the issue adequately in the argument section of his brief to the court of appeals. This claim elevates form over substance to an extreme degree.[9]

Respondent's effort to blame petitioner for the court of appeals' error is particularly inappropriate. In determining that petitioner's case should be dismissed for failure to exhaust administrative remedies, the court did no more than what respondent had specifically urged it to do. Indeed, as it had in the district court, respondent specifically argued to the court of appeals that § 15(d) requires a notice of intent to sue to be filed "within thirty days prior to commencing suit," Resp. C.A. Br. 6, and that § 15(b) remedies must be timely invoked and exhausted in the same manner as administrative remedies under § 717 of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-16, Resp. C.A. Br. 7, positions respondent now concedes were clearly erroneous. It is commendable that respondent has acknowledged in this Court its own error in inviting the court of appeals' rulings. However, having urged the Court below to make those erroneous rulings, respondent cannot now be permitted to argue that this

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[9] In any event, the question presented is purely legal, and does not depend in any way on the particular circumstances of this case. This Court has repeatedly held that "purely legal questions" can be appropriately reviewed even if those questions were not properly presented or decided in the court of appeals. *E.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982).

Court should leave the errors uncorrected because the issues received inadequate consideration below.

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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## APPENDIX

RESP. C.A. BRIEF

V. ARGUMENT

A. When A Federal Employee Pursues An Administrative Complaint Age Discrimination Against His Employer, He Must Meet All Administrative Requirements.

Mr. Stevens brought his claim under the ADEA. 29 U.S.C. § 633a. A federal employee who believes that he has been discriminated against because of age has two avenues of relief under the ADEA. He may proceed directly to Federal Court provided that he initiates the civil action no later than 180 days from the unlawful action and that a Notice of Intent to Sue is given to the Equal Employment Opportunity Commission within thirty days prior to commencing suit. 29 U.S.C. § 633.a(d); *Ray v. Nimmo*, 704 F.2d 1480, 1483 (11th Cir. 1983); *Castro v. United States*, 775 F.2d 399 (1st Cir. 1985).

In lieu of filing directly with the Court, an employee may file an administrative complaint with the employing federal agency pursuant to regulations established by the Equal Employment Opportunity Commission pursuant to its authority under the ADEA. 29 U.S.C. § 633a(b). The EEOC has promulgated regulations pursuant to this statutory authority and they are found at 29 C.F.R. § 1613.501, et seq. If an employee files an administrative claim with his agency, the employee must properly exhaust his administrative remedies like employees alleging other types of discrimination. 29 U.S.C. § 633a(b); 29 C.F.R. § 1613.511; *Paterson v. Weinberger*, 644 F.2d 521, 523 (5th Cir. 1981); *Purtill v. Harris*, 658 F.2d 134, 138, (3rd Cir.

1981), cert. denied 462 U.S. 1131. Suits arising under the ADEA are reviewed under the same standards as suits brought under Title VII of the Civil Rights Act of 1964 as amended. *Bohrer v. Hanes Corporation*, 715 F.2d 213, 218 (5th Cir. 1983).

It is well established that a federal employee must timely exhaust any administrative remedies available to him before he can bring suit. *Brown v. General Service Administration*, 425 U.S. 820, 832 (1976); *Hoffman v. Boeing*, 596 F.2d 683, 685 (5th Cir. 1979); *Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405 (D.C. Cir. 1985). In this case there is no doubt that Mr. Stevens did not contact an EEO counselor within thirty days of his belief that his reassignment was caused by age discrimination. Judge Bunton's determination is well supported in the record and appellant is not contesting the factual determinations of Judge Bunton. Therefore, Judge Bunton properly dismissed Mr. Stevens cause of action because Mr. Stevens did not meet the administrative requirements.

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